SHER TREMONTE LLP

September 19, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write to the Court in opposition to the government's letter, filed today, indicating that it seeks to call Shant Chalian, an attorney from Hodgson Russ LLP, whom the government earlier indicated it would not call because his testimony would raise issues relating to Gerova's assertion of the attorney-client privilege.

As an initial matter, *the government* elicited the evidence that it now claims created a misimpression in the minds of the jury and that, it argues, Mr. Chalian's testimony is needed to correct. On *direct* examination of Mr. Hlavsa, the following colloquy occurred:

> Q: (by Ms. Hector) After you reviewed the calculation, what, if any, conversations did you have with Mr. Hirst about your reaction to the calculation?
>
> A: I asked him why no one was involved from the financial area in the calculation.
>
> Q: And you remember what he said in response?
>
> A: His response was that a gentleman with Hodgson Russ, Shant Chilian [*sic*], had done the calculation.

Trial Tr. 433:15-22. The defense's questions on cross-examination were simply following up on the testimony that was elicited on direct. In addition, the *Government's* Exhibit 600-B indicates that Mr. Hlavsa asked Mr. Hirst whether Mr. Chalian would have a copy of the warrant calculation, to which Mr. Hirst responded, "I'll ask and get back to you."

The government's attempt to impeach this aspect of its own case by calling Mr. Chalian should be rejected. For the reasons outlined in our letter dated September 8, 2016, Mr. Chalian should be precluded from testifying because Gerova has not waived privilege. As a result, the defense lacks access to Mr. Chalian's prior statements. As previously noted, Hodgson Russ has itemized thousands of emails related to Gerova in its possession, the vast majority of which it claims are privileged. Although the government has indicated that it plans to call Mr. Chalian for the "limited" purpose of stating that he did not produce the warrant calculation, that proposed testimony is in no way "limited." By testifying that he did not prepare the warrant calculation, Mr. Chalian would essentially be accusing Mr. Hirst of lying to and deceiving Mr. Hlavsa, leading the jury to infer that Mr. Chalian had nothing to do with the warrant agreement and that he did not see it until the September 28 email from Mr. Weiss, which is already in evidence. Without access to all of Mr. Chalian's prior statements, the defense would have no way of cross-examining Mr. Chalian to test the truth of his assertion, in violation of the Confrontation Clause of the U.S. Constitution. *See Dunbar v. Harris*, 612 F.2d 690, 692 (2d Cir. 1979) (noting that the confrontation clause "guarantees a criminal defendant the right to cross-examine witnesses against him" and holding that "[i]f a defendant's cross-examination is restricted" by a competing privilege of the witness," it may be necessary to strike the direct testimony of that witness"); *accord Murdoch v. Castro*, 365 F.3d 699, 702 (9th Cir. 2004); *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994).[1]

Mr. Kearney's affidavit in no way assuages these concerns. Just the opposite: his unexamined assertions about Mr. Chalian's document retention practices and the electronic searches conducted by others in his law firm contain multiple levels of hearsay, none of which the defense could test, according to the government's view.

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[1] There are additional complications. The report of documents that had been made available to the SEC in 2015 had only been made available to us on Friday, September 9, 2016. While at that point we could have subpoenaed emails that did not appear on their face to be privileged, on the eve of trial, the government advised us that it would not be calling Mr. Chalian because of the privilege concerns and so we have not pursued obtaining those non-privileged documents.

For the foregoing reasons, the government should not be permitted to call Mr. Chalian to impeach testimony that it elicited. Its request should be denied.

Respectfully submitted,

/s/ *Michael Tremonte*

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